IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2006

CORAM :

THE HON'BLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 1527 of 1993

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Duraisami @ R. Natarajan .. Appellant

Versus

1. M. Vellingiri

2. M. Krishnasamy

3. M. Thannasi

4. Smt. Marudayee Ammal

5. Smt. Thangammal

6. Smt. Bala Kuppammal

7. Palanisami .. Respondents

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Appeal under Section 100 CPC against the decree and judgment dated 21.09.1993 made in A.S. No. 111 of 1993 on the file of Principal District Judge, Coimbatore confirming the decree and judgment dated 30.04.1993 made in O.S. No. 1228 of 1983 on the file of District Munsif Court, Coimbatore.

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For Appellant : Mr. J. Jayendrakrishnan
For Respondents : No appearance
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JUDGMENT

The unsuccessful defendant before the courts below is the appellant in this second appeal. The Plaintiffs/respondents herein have filed the suit in O.S. No. 1228 of 1983 on the file of District Munsif, Coimbatore for declaration to declare their right and title in respect of item No.2 of the suit property, directing the defendant to deliver vacant possession of the said item of the property and

for costs. The said suit was decreed as against which the appellant herein has filed A.S. No. 111 of 1993 which was also dismissed, hence, the present second appeal.

2. For the sake of convenience, the parties shall be referred to as they were arrayed in the suit.

3. The Plaintiffs 1 and 2 are sons of Marudachala Gounder born through his first wife Palaniammal. The plaintiffs 3 and 4 are sons of Marudachala Gounder born through his second wife Marudayeeammal, who is the fifth plaintiff. The 6th plaintiff is the wife of the first plaintiff. The plaintiffs 7 and 8 are daughter and son of 6th plaintiff and 1st Plaintiff respectively. The defendant is the son of the sister of the Plaintiffs 1 to 4 and step daughter of the 5th plaintiff.

4. The case of the plaintiff is that originally, the suit property belonged to Marudachala Gounder, who purchased the same under Ex.A1, sale deed dated 22.11.1931 and ever since the date of Ex.A1, he was in possession and enjoyment of the suit properties. The said Marudachala Gounder mortgaged the suit property to one Dr. Natesan under Ex.A2, mortgage deed dated 29.10.1944. In the year 1948, Marudachala Gounder died intestate. In the year 1962, the plaintiffs redeemed the mortgage and ever since the date of redemption, they claim that they are in possession and enjoyment of the suit properties by paying necessary taxes and charges to the authorities concerned. Five years prior to institution of the suit, the defendant approached the plaintiffs to permit him to reside in the suit property for a few months to enable him to seek accommodation elsewhere, accordingly, he was permitted to occupy item No.2 of the suit property. Since the defendant refused to vacate the said property, the suit was filed.

5. The case of the defendant is that he was living in item No.2 of the suit property from his childhood along with his mother for about 30 years prior to institution of the suit. The suit property was given to his mother by his father and after the death of his mother, he is living in the said item No.2 of the suit property in his own right. Since he continuously living in the suit property for over 30 years, he perfected his title by adverse possession.

6. Before the trial court, the plaintiffs have marked Exs. A1 to A14 and the second plaintiff examined himself as PW1 and one Kuppusamy as PW2. The defendant marked Exs. B1, Radio Licence in his favour and Ex.B2, ration card issued for the year 1993-1998 and examined himself as DW1 and one Dhandapani as DW2.

7. The trial court, after considering the oral and documentary evidence found that the suit property originally belonged to Marudachala Gounder, who purchased the same under Ex.A1, sale deed dated 22.11.1931 from one Appu @ Nanjappa Gounder for a valid consideration and ever since the date of purchase, he was in possession of the same by paying taxes and charges to the authorities concerned; that under Ex.A2, the said Marudachala Gounder has executed a mortgage deed in favour of Dr. Natesan which was subsequently redeemed by the plaintiffs; that Exs. A4 to A13 tax receipts prove that the plaintiffs are the owners of the suit properties; that Ex.A14 is the death certificate of Marudachala Gounder. The said documents prove that after the death of Marudachala Gounder in the year 1948, the plaintiffs succeeded his estate as his legal heirs; that the defendant claimed that item No.2 of the suit property was given by his father to his mother, for which, no evidence was let in by him; that the averment that the defendant was in possession of the suit property for more than 30 years and perfected his title by adverse possession is also not proved by letting any valid evidence; that in Ex. B1, radio licence the name of the defendant is not found mentioned and Ex.B2, family card no way support the case of the defendant and decreed the suit.

8. The first appellate Court on consideration of the oral and documentary evidence pointed out that DW1 in his evidence has stated that he was not aware of the fact that item No.2 of the suit property

was given by his father to his mother; that Exs. B1 and B2 are not sufficient to prove that the defendant perfected his title by way of adverse possession. It is further pointed out by the first appellate Court that there is no valid evidence to show that the defendant was living in the suit property for more than 30 years; that the defendant has filed an application under Order 41 Rule 27 CPC in I.A. No. 4804 of 1993 praying to receive certain documents as additional evidence, which was dismissed stating that there is no explanation offered by the defendant as to why the said documents were not marked by him before the trial court. Ultimately, the first appellate Court dismissed the appeal by confirming the decree and judgment passed by the trial court.

9. The second appeal was admitted on the below mentioned substantial questions of Law.

i) Whether the defendant has perfected his title by adverse possession in view of open, continuous and exclusive possession for over 30 years in the property bearing Door No.10, New Door No.20, Sellapillai Lane, Coimbatore?

ii) Are the conclusions of courts below based on any evidence oral or documentary relevant to item 2 of suit property?

iii) Are the lower Courts justified in placing the burden on defendant when the facts of the case do not come under Article 64 and Article 65 of Limitation Act?

iv) Is the appellate Court justified in rejecting the application in IA No. 4804 of 1993 to receive additional evidence?

10. The first substantial question of Law is whether the defendant has perfected his title by adverse possession or not. The third substantial question of law is whether the courts below are justified in shifting the burden on the appellant. Article 64 relates to suit for possession of an immovable property. A person claims adverse possession must prove it. Where there is no evidence as to who was in possession, the presumption is that the owner is in possession. The plea of adverse possession would not be available to the defendant unless it has been asserted and pointed out hostile animus of retaining possession as an owner after getting in possession of the immovable property. Followed (Mohan Lal (deceased) through his Lrs. Kachru and others vs. Mira Abdul Gaffar and another) AIR 1996 Supreme Court 910 wherein in Para No.4, it was held thus:-

4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription nec vi nec clam nec precario. Since the appellant s claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

11. Even long possession for a period more than 12 years without intention to possess suit property adversely to the title of the plaintiff and to latter's knowledge cannot result in acquisition of title by defendant to encroach suit land. Further the plaintiff's suit is not merely based on his prior possession or subsequent dispossession but also on the basis of title and limitation for such suits are governed by Article 65. The Plaintiff's title over the encroached land could not be extinguished unless defendant has prescribed title by remaining in adverse possession for a continuous period of 12 years. Followed (Deva (dead) by Lrs vs. Sajjan Kumar (dead) by Lrs.) AIR 2003 Supreme Court

3907 wherein in Para Nos. 11, 12 and 13, it was held thus:-

11. ....The animus to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment on plaintiff's survey number.

12. The abovequoted admission contained in the defendant's deposition, does not make out a case in his favour of having acquired title by adverse possession. Mere long possession of the defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to the latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land.

13. The plaintiff's suit is not merely based on his prior possession and subsequent dispossession but also on the basis of his title to Survey No. 452. The limitation for such a suit is governed by Article 65 of the Limitation Act of 1963. The plaintiff's title over the encroached land could not get extinguished unless the defendant had prescribed title by remaining in adverse possession for a continuous period of 12 years.

12. The Courts below on careful scrutiny of evidence available on record found that the appellant was permitted to stay in item No.2 of the suit property, but he has not asserted and pointed out hostile animus of retaining possession. He, who claims adverse possession has to prove it, which is not proved by him. The said finding of the courts below is perfectly valid, hence, the first and third substantial questions of Law are answered against the appellant.

13. In so far as the second question of law is concerned, it is a question relating to fact. Considering the evidence available on record, the courts below have rightly granted the relief sought for by the plaintiffs, hence, the same is also answered against the plaintiffs.

14. The last substantial question of law is as to whether the first appellate Court is justified in rejecting I.A. No. 4804 of 1993 was filed to receive additional evidence is concerned, this Court is of the view that the appellant has not given any satisfactory explanation as to why the said documents were not marked before the trial court, hence, the first appellate Court is right in dismissing the said application. Therefore, the fourth substantial question of law is also answered against the appellant.

15. In the result, the decree and judgment of the courts below are confirmed. The second appeal is dismissed. No costs.

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To

1. The Principal District Judge
District Court
Coimbatore

2. The District Munsif Court
District Munsif
Coimbatore

3. The Section Officer
Vernacular Records Section
High Court
Madras 600 104

[PRV/8816]